STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC UTILITIES COMMISSION
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November 4, 1993

VIA FEDERAL EXPRESS

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252

Dear Mr. Caton:

Please find enclosed for filing an original plus 11 copies of the COMMENTS OF CALIFORNIA in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

Ellen S. LeVine

Ellen S. LeVine
Attorney for California

ESL:mal

Enclosures (13)

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act	))))	GN Docket No. 93-252

COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The People of the State of California and the Public Utilities Commission of the State of California ("CPUC") hereby submit these initial comments in the above-docketed proceeding.

In its Notice of Proposed Rulemaking ("NPRM"), the Federal Communications Commission ("FCC") has requested comments on the proposed regulations designed to implement the framework for the regulation of mobile radio services as set forth in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"). By these comments the CPUC will address the following:

1. The regulatory classification of personal communications services (PCS);
2. Forbearance of certain Title II (Common Carrier) regulations; and
3. Interconnection issues

I. THE REGULATORY CLASSIFICATION OF PERSONAL COMMUNICATIONS SERVICES

The FCC tentatively concludes that there should not be a single regulatory classification applied to all PCS licensees because if PCS were defined exclusively as commercial mobile services the potential diversity of applications would be unnecessarily restricted. The FCC proposes to allow all PCS licensees to choose whether to provide commercial mobile or private mobile service, regardless of frequency assignment, in order to allow licensees to provide services based on market demand rather than on regulatory preconditions. Comments are requested regarding how the self-designation options of PCS licensees should be structured, whether regulatory status could be changed during the term of the license, and how to verify if the licensees are complying with the requirements of Section 332 of the Communications Act, as amended by the Budget Act.

The FCC's proposal to allow varied regulatory classifications and licensee-choice is a reasonable proposal with a laudable goal. The self-designation option of PCS licensees should be structured to promote easier entry and exit from the private or commercial markets through a streamlined permitting process. However, the CPUC believes that there may be significant difficulties for implementation and enforcement of the FCC's policies, especially for licensees that propose to provide both commercial and private mobile service.

For example, there is no mechanism by which the FCC could ensure that a licensee claiming to be a not-for-profit mobile service provider is not also using the system for commercial for-profit services -- i.e., selling unused or excess capacity on a for-profit basis. If the PCS system were not interconnected to the Public Switched Network (PSN), this would be less of a concern. However, if it is possible to interconnect the PCS system with the PSN, there would need to be some kind of mechanism in place to ensure that the not-for-profit PCS provider is not providing for-profit service.[1] Absent such a mechanism, there may be a strong incentive to claim not-for-profit status and yet sell excess capacity for profit.

One FCC-suggested alternative is to allow licensees to provide both private and commercial mobile radio service. However, this alternative would further complicate the enforcement mechanism because it is unclear how the FCC would determine what percentage of the service provided is private and what percentage is commercial.

The CPUC therefore recommends that, in order to simplify enforcement, no provision of commercial and private mobile service within the same license should be permitted.

In addition, the FCC should allow the not-for-profit mobile service providers to change their regulatory status upon notification of the appropriate governmental entities in order to facilitate entry into the commercial market. However, with respect to exit by a common carrier provider from the commercial market, the FCC or other appropriate governmental entities must ensure that such exist does not unduly harm consumers who have subscribed to that provider's service.

1. There should be a distinction drawn between whether the provider is simply selling off a portion of its allocated spectrum that is unused to another mobile communications provider or whether the provider is actually offering a communications service. The CPUC might encourage the development of a market for unused spectrum since that would promote an economically efficient allocation of scarce resources. In the case of selling off unused spectrum to another provider, the FCC or CPUC may not wish to designate that portion as for-profit in order to encourage the development of the market. However, in the case that the provider is providing a communications service, it should be designated for-profit.

The FCC also proposes to classify shared systems currently operating under Part 90 as not-for-profit as long as service is provided on a shared-cost basis, with no licensee seeking or obtaining a profit from the service.[2] The FCC, however, acknowledges that problems may arise where the shared systems are managed by a for-profit entity.[3] On the surface, this arrangement looks very similar to the aggregator/reseller arrangements commonly found in the interexchange ("IEC") market. Aggregators and resellers in the non-dominant IEC market have been known to switch IEC customers without the customer's consent, to present misleading advertising, and to charge exorbitant rates. Much of the general public remains uniformed about the IEC market and many do not even realize the difference between IECs and local exchange carriers ("LECs"). Given these and other customer abuses that the CPUC has witnessed in the IEC market, the CPUC would advise caution in designating these shared systems as not-for-profit.

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2. Shared systems involve either an arrangement where the licensee offers excess capacity to unlicensed eligible users or where each user of the licensed facilities is individually licensed. The latter type of system, commonly referred to as 'multiple-licensed' systems, takes the form of either non-profit cooperatives, where system costs are equally divided among all licensed users, or so-called 'community repeaters' where one of the system licensees or an unlicensed third party manages the system for the other licensed users.

3. There is also the question of what constitutes a cost in the case of the licensee providing the service on a shared-cost basis. For example, would a handsome salary constitute a proper cost for a licensee?

In addition, the FCC should allow the not-for-profit mobile service providers to change their regulatory status upon notification of the appropriate governmental entities in order to facilitate entry into or exit from the commercial market. However, with respect to exit by a common carrier provider from the commercial market, the FCC or other appropriate governmental entities must ensure that such exist does not unduly harm consumers who have subscribed to that provider's service.

II. FORBEARANCE OF CERTAIN TITLE II COMMON CARRIER REGULATIONS

Section 332(c)(1)(A) permits the FCC to forbear from imposing certain provisions of Title II upon some or all commercial mobile service providers if the following determinations are made:

1. Enforcement of such provision is not necessary to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonable discriminatory;

2. Enforcement of such provision is not necessary for the protection of consumers; and

3. Specifying such provision is consistent with the public interest."[4]

The FCC has tentatively found that the level of competition in the commercial mobile services marketplace is sufficient to

4. NPRM at ¶ 57

permit forbearance from tariff regulation of the rates for commercial mobile service provided to end users. Among other things, the FCC observed that PCS providers "will be subject to substantial competition, both from other PCS services... and from the wide range of radio-based services currently offered: cellular services, specialized mobile radio services, paging services, wireless in-building services, cordless phones, and others."[5] The FCC then tentatively concluded that... there will be no monopoly service provider, thereby reducing the need for government to protect customers from abuses stemming from market power.[6] As a result, the Commission tentatively concluded that PCS should be subject to minimal regulation.[7]

It has been the long standing position of the CPUC and consumer groups, based on a factual record developed before the CPUC, that adequate competition does not exist in California in order to ensure just, reasonable, and nondiscriminatory rates. This position is buttressed by the findings of a recent legislative hearing conducted by Senator Herschel Rosenthal, chairman of the California State Senate Energy and Public Utilities Committee on the state of the cellular industry in California. At the hearing, the CPUC presented evidence on how rates that were set nearly nine years ago have not fallen. The CPUC initially set the rates that cellular carriers could charge

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5. PCS Notice, 7 FCC Rcd at 5712.

6. Id.

7. NPRM at ¶ 62.

at what the market would bear in order to promote the growth of the industry. It was then anticipated that competition between the carriers in each market would drive down rates. That, however, did not occur. Although the cellular carriers claim that there is sufficient competition in the California market, the facts demonstrate otherwise. The market for cellular licenses that developed after the licenses were issued has resulted in incestuous relationships within the cellular industry where a competitor in one market area has an ownership interest in the other competitor in that same market, or where competitors in one market area are partners in another market area. As CPUC President Fessler stated at the Senate hearing, competition in the cellular industry can be likened to professional wrestling where there is a lot of noise and a lot of action but nobody really gets hurt.

The CPUC recently issued a decision (D.93-04-058) giving the cellular carriers the flexibility to raise or lower their rates under a price ceiling with minimal regulatory review. The decision responds to the carriers' claim that a major barrier to lower rates was the fear that if rates were lowered, the carriers would not be allowed to raise them back to their original level in the event of a miscalculation or in response to changing market conditions. To date, there have only been minuscule changes in the rates that are charged. However, even with its newly-gained flexibility, the majority of carriers continue to keep their rates at the rate ceiling set by the CPUC.

Given the lack of competition between the cellular carriers within California markets, the CPUC believes that it would be premature for the FCC to forbear tariff regulation of the rates for commercial mobile service provided to end users.

The market for licenses to provide cellular service that emerged following the issuance of these licenses by the FCC has consolidated control over the cellular industry among the dominant common carriers such as the Regional Bell Operating Companies ("RBOCs"). The recently proposed merger of AT&T and McCaw, the nation's largest cellular service provider, serves to provide further evidence of this consolidation.

In addition, the CPUC urges the FCC not to forbear from prescribing accounting systems under Section 220 of Title II for dominant providers of commercial mobile services in order to guard against anti-competitive abuses by such providers. Dominant carriers will undoubtedly compete for and receive a portion of the PCS licenses that will soon be issued. The CPUC believes that a market similar to the cellular market will develop for PCS licenses. Since many of the dominant carriers, such as the RBOCs, still have captive rate bases, the CPUC believes that proper accounting systems should be prescribed in order to deter cross-subsidy and other anti-competitive behavior.

Moreover, since mobile services, specifically PCS and cellular, are expected to compete with the LECs and IECs, the FCC should not forbear from applying the consumer protections contained in Sections 223, 225, 226, 227, and 228 of Title II.

III. RIGHT TO INTERCONNECTION

In paragraph 71 of the NPRM, the FCC tentatively seeks to preempt state regulation "of the right to intrastate interconnection and the right to specify the type of interconnection" for commercial mobile service providers. The FCC bases its proposal on the ground that it has preempted the states from prescribing different interconnection arrangements for cellular carriers. NPRM at ¶ 70. Federal preemption is based on the FCC's conclusion that interconnection arrangements are inseverable between state and federal jurisdictions, and that differing state arrangements "would negate the federal purpose of ensuring interconnection to the interstate network." NPRM at ¶ 71.

The CPUC respectfully submits that federal preemption is unwarranted. In the first place, it is premature. The FCC identifies no specific state regulation governing intrastate interconnection rights or arrangements with respect to existing mobile service providers that negates interstate interconnection rights or arrangements.

Second, there is no basis to conclude that all state interconnection arrangements applicable to intrastate mobile service providers necessarily negate interstate arrangements or otherwise conflict with federal goals underlying such arrangements. States may, for example, require local exchange companies to make available switching, transport or other technically feasible capabilities or arrangements which go beyond federal requirements. In that event, more favorable or efficient arrangements on behalf of the interconnecting mobile service provider would advance, not undermine, federal goals, and hence be fully consistent therewith. See also House Report No. 103-111, page 261 ("interconnection serves to enhance competition and advance a seamless national network.") Allowing states to prescribe enhanced interconnection arrangements beyond federal requirements also comports with congressional intent not to preclude states from prescribing terms and conditions, other than rates or entry, governing the provision of such services. House Report No. 103-111, page 261. To the extent that state interconnection arrangements promote federal goals, they should not be preempted.

Although not proposing to preempt state authority to prescribe rates for intrastate interconnection service, the FCC nevertheless seeks comment on whether Section 332(c)(3) requires such preemption. Section 332(c)(3) expressly provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service..."

By its terms, Congress intended to preempt only state regulation of the "rates charged by" mobile service providers. The legislative history of the Budget Act indicates that Congress was concerned that rates charged for services rendered to the end users of mobile services should generally not be subject to state regulation unless such regulation is necessary to ensure just, reasonable and nondiscriminatory prices to such users.

Congress, however, expressed no intent to preempt the states from continuing to set interconnection rates designed to recoup switching and other costs of using facilities of the landline public switched network, or the facilities of the mobile service provider. Such rates are simply access charges, which since divestiture, state and federal regulators have set for intrastate and interstate interconnection of basic communications services, respectively, without impinging upon each other's authority. There is no rational basis to assume that continued dual jurisdictional authority over access charges, or interconnection rates, will negate federal authority, given that such result has not occurred in other contexts.

Moreover, given the infancy of the personal communications services industry, and the expectation that this industry will eventually compete directly with local exchange wireline service in local markets, it is reasonable for states to ensure that intrastate interconnection arrangements between PCS providers and the LECs provide a "level playing field" and prevent anticompetitive behavior by the LECs in these local markets.

Finally, given the fact that that PCS and cellular service will compete with the LECs, the CPUC believes that PCS and cellular should be subject to the same equal access obligations imposed on the LECs to ensure a level playing field as the mobile service industry matures. If mobile services are not held to the same standard of equal access as the LECs are, the mobile services would have a significant unfair competitive advantage over the LECs.

CONCLUSION

For the reasons stated, the CPUC urges the following: (1) the FCC should allow PCS providers to determine whether to offer services as a commercial or private service provider, but should not allow such providers to offer both services under a single PCS license; (2) the FCC should carefully consider whether shared systems should be classified as private, given customer experience with aggregator/reseller arrangements; (3) the FCC should ensure that any exit from the market by a commercial mobile service provider shall not harm the consumers who have subscribed to that provider's service; (4) the FCC should not forbear from regulating the rates for existing commercial mobile services until effective competition emerges in the market in which these services are provided; (5) the FCC should establish accounting safeguards for dominant carriers which intend to provide PCS services; (6) the FCC should apply Sections 223, 225, 226, 227 and 228 of Title II to all commercial mobile service providers; (7) the FCC should not preempt states from prescribing more favorable interconnection arrangements, or from prescribing intrastate interconnection rates; and (8) the FCC should require PCS providers to adhere to equal access obligations imposed on the LECs.

Respectfully submitted,

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of the State of California
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Commission of the State
California

November 4, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all known parties of record in this proceeding by mailing by first-class mail a copy thereof properly addressed to each party.

Dated at San Francisco, California this 4th day of November, 1993.

Ellen S. LeVine

Ellen S. LeVine